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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/030,966	06/20/2002	Stephen Richard Hellaby	0290-0180P	2811
2292	7590	09/20/2004		
BIRCH STEWART KOLASCH & BIRCH PO BOX 747 FALLS CHURCH, VA 22040-0747			EXAMINER	BECKER, DREW E
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 09/20/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	10/030,966	HELLABY ET AL.
	<b>Examiner</b>	<b>Art Unit</b>
	Drew E Becker	1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### **Status**

- 1) Responsive to communication(s) filed on 28 July 2004.
- 2a) This action is **FINAL**.                                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### **Disposition of Claims**

- 4) Claim(s) 1-40 is/are pending in the application.
- 4a) Of the above claim(s) 33-36 and 39 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-32,37,38 and 40 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### **Application Papers**

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### **Priority under 35 U.S.C. § 119**

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
  1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### **Attachment(s)**

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
 Paper No(s)/Mail Date \_\_\_\_\_.
- 4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date \_\_\_\_\_.
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: \_\_\_\_\_.

**DETAILED ACTION**

***Election/Restrictions***

1. Applicant's election with traverse of claims 1-32, 37-38, and 40 in the reply filed on July 28, 2004 is acknowledged. The traversal is on the ground(s) that the two groups are closely related. This is not found persuasive because the special technical feature of group II is not found in group I as explained the previous action.

The requirement is still deemed proper and is therefore made FINAL.

2. Claims 33-36 and 39 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected group, there being no allowable generic or linking claim.

***Claim Rejections - 35 USC § 112***

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 1-32, 37-38, and 40 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

5. The claims are generally narrative and indefinite, failing to conform with current U.S. practice. They appear to be a literal translation into English from a foreign document and are replete with grammatical and idiomatic errors.

6. Claims 1, 4-5, 7-12, and 37 recite phrases such as "the d[0.5] value is less than 100 micrometers". It is not clear what range, or size this refers to. It is not clear whether

these ranges can be smaller, or greater. It does not seem to follow the definition provided on page 5 of the specification.

7. Claim 1 recites “excluding sugar-in-oil suspensions and nut pastes and nut butters”. It is not clear whether these components are the composition itself, or the carrier liquid.

8. Claim 8 recite phrases such as “(other than... nut spread)” and (such as...”). It is not clear whether these limitations are required or not.

9. Claims 6 and 30 recite “such as”. It is not clear whether these limitations are required or not.

10. Claim 7-8 and 24-25 recite “for example”. It is not clear whether these limitations are required or not.

11. Claim 15 recites “comprising or consisting essentially of flavoring or seasoning components and optionally diluents or carriers therefore”. It is not clear which of these limitations are required or optional.

12. Claims 3, 14, and 25 recite phrases such as “such as drinks (eg. stimulant suspensions,...”. It is not clear whether these are required limitations or not.

13. Claim 23 recites “substantially free from nuts”. It is not clear what level of nuts would be considered “substantially free”.

14. Claim 25 recites “preferably”. It is not clear whether these limitations are required or not.

15. Claim 26 recites "ad". It is not clear what this is.
16. Claims 38 and 40 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite in that it fails to point out what is included or excluded by the claim language.  
This claim is an omnibus type claim.

***Claim Rejections - 35 USC § 102***

17. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

18. Claims 1-4, 7-25, 27-28, 31-32, 37-38, and 40 are rejected under 35 U.S.C. 102(b) as being anticipated by EP 0518507A1.

EP 0518507A1 teaches a snack-food coating composition comprising flavor particulates suspended in oil and the particulates having a size of less than 20 micrometers (abstract), the composition inherently possessing a viscosity of 50-100 mPa/s and at least 95% adhesion, a solids content of about 30%, the vegetable oil being liquid at room temperature (Example 2), and an absence of nuts. Phrases such as "using a low shear high impact milling method" are merely preferred methods of making the claimed product. Phrases such as "which is a bread improver composition" are merely preferred methods of using the claimed product.

19. Claims 1-5, 7-29, 31-32, 37-38, and 40 are rejected under 35 U.S.C. 102(b) as being anticipated by Shuford et al [Pat. No. 4,375,483].

Shuford et al teach a composition comprising flavor particulates suspended in oil (abstract), the particulates having a size of 1-10 micrometers (column 4, line 59), lecithin (column 5, lines 36-56), silicas (column 5, lines 58-68), emulsifiers (column 7, line 34), the composition inherently possessing a viscosity of 50-100 mPa/s and at least 95% adhesion, a solids content of about 30%, the oil being liquid at room temperature, an absence of nuts, and the use of any oil including rapeseed (column 2, line 44; column 3, line 35). Phrases such as "using a low shear high impact milling method" are merely preferred methods of making the claimed product. Phrases such as "which is a bread improver composition" are merely preferred methods of using the claimed product.

#### ***Claim Rejections - 35 USC § 103***

20. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

21. Claims 6 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shuford et al as applied above, in view of Huffman [Pat. No. 4,612,204]. Shuford et al teach the above mentioned components. Shuford et al do not recite calcium phosphate and ascorbic acid. Huffman teaches a composition comprising

calcium phosphate as a flow conditioner (column 3, line 14) and ascorbic acid (column 4, line 39). It would have been obvious to one of ordinary skill in the art to incorporate the calcium phosphate and ascorbic acid of Huffman into the invention of Shuford et al since both are directed to food compositions, since Shuford et al already included flow agents such as silicas (column 5, lines 58-68) and optional ingredients such as flavors (column 7, lines 30-68), since calcium phosphate was a commonly used flow agent as shown by Huffman (column 3, line 14) with the added benefit of providing a source of calcium, and since the ascorbic acid of Huffman would have provided a source of vitamin C.

22. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Hsu [Pat. No. 4,016,337], Voituriez [Pat. No. 4,925,688], Stark et al [Pat. No. 5,021,248], Kleemann [Pat. No. 5,230,913], Block et al [Pat. No. 3,433,650], Kelly et al [Pat. No. 5,846,587], and Ueno et al [Pat. No. 3,716,381] teach food compositions.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew E Becker whose telephone number is 571-272-1396. The examiner can normally be reached on Mon.-Thur. 8am-5pm and every other Fri. 8am-4pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*Drew Becker*  
Drew E Becker  
Primary Examiner  
Art Unit 1761

*9-16-04*